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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

File: [redacted] Office: BANGKOK, THAILAND Date: APR 17 2003

IN RE: Applicant: [redacted]

Application: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) filed in conjunction Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(h); Section 212(i) of the Act, 8 U.S.C. § 1182(i); and Section 212(a)(9)(B)(v) of the Act, 8 U.S.C. § 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT: [redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Weimann, Director
Administrative Appeals Office

[redacted]

DISCUSSION: The applications were denied by the Acting District Director, Bangkok, Thailand, and are now on appeal before the Administrative Appeals Office (AAO). The AAO will dismiss the appeal of the Form I-212 (Application for Permission to Reapply for Admission) and will withdraw the denial of the Form I-601 (Application for Waiver of Grounds of Inadmissibility).

The applicant is a native and citizen of New Zealand who was found by a consular officer to be inadmissible to the United States under section 212(a)(9)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(ii) for having been removed from the United States; under section 212(a)(2)(A)(i) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i), for having been convicted of a crime relating to a controlled substance; under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(6)(C)(i), for having procured a visa by fraud or willful misrepresentation; and under section 212(a)(9)(B)(i)(II) of the Act, 8 U.S.C. § 1182(a)(9)(B)(i)(I), for having been unlawfully present in the United States for a period of one year or more.

The applicant is the spouse and mother of United States citizens and is the beneficiary of an approved petition for alien relative. She seeks the above waiver in order to travel to the United States to reside with her spouse and child.

In a single decision addressing both the Form I-212 and Form I-601 applications, the acting district director concluded that the unfavorable factors outweighed the favorable factors in the matter and denied the applications as a matter of discretion.

On appeal, counsel submits a brief asserting that there was no fraud or willful misrepresentation of any material facts by the applicant concerning her prior criminal history; the applicant's criminal history is not nearly as egregious as the record and decision reflect; the decision failed to adequately consider extreme hardship to the applicant's son; and a balancing of the equities supports the applicant's request and justifies a reversal of the decision. Counsel concludes that the applicant is not of such bad or unsavory moral character that she should be barred from reuniting with her young child and spouse in the United States and that the applicant's child and spouse both desperately want and need the applicant in their lives.

The record reflects that the applicant was initially admitted to the United States as a nonimmigrant visitor under the Visa Waiver Pilot Program (VWPP) on February 14, 1992, with authorization to remain until May 13, 1992. She remained longer than authorized and was unlawfully present in the United States from April 1, 1997, the date the calculation for unlawful presence begins, until November 12, 1999 when she departed the United States under an order of deportation issued on September 18, 1999.

[redacted]

The file further reflects that while in the United States, the applicant was arrested on several occasions for a variety of offenses. At her immigrant visa interview before a consular officer in Auckland, New Zealand, the applicant failed reveal all of her criminal history, as follows:

The applicant was charged in Houman, Louisiana with having, on or about April 9, 1994, unlawfully and intentionally possessing drug paraphernalia, viz.: a crack pipe in violation of LSA-R.S. 40:1033 (case number 250-691). A $500 surety bond was posted. The record indicates that the applicant was tried, found guilty, sentenced to six months in county jail, and ordered to pay a fine of $200.00 and court costs. She was also placed on unsupervised probation for a term of one year on the condition that she commit no further crimes and that she pay the fine and costs.

On or about May 29, 1993 the applicant was charged with having knowingly, willfully, and intentionally possessed a Schedule II controlled dangerous substance, viz.: cocaine in violation of LSA-R.S. 40-967 A(1) (case number 239-919). A bench warrant was issued on November 8, 1994 based upon the applicant's failure to appear for trial.

With regard to the above two charges, the applicant filed a motion to withdraw her guilty plea on January 2, 2002. The motion was granted that same date and the court ordered that a nolle prosequi be entered in the record.

On July 28, 1994, the applicant was arrested in Baton Rouge, Louisiana for one count of prostitution and one count of inciting prostitution.

On August 2, 1994, the applicant was arrested for possession of drug paraphernalia.

On September 29, 1994, the applicant was arrested for possession of marijuana, possession of drug paraphernalia and no driver's license.

On October 27, 1994, the applicant was arrested in Naples, Florida for driving under the influence of alcohol or drugs. On November 7, 1994, she pled nolo contendere. She was found guilty, sentenced to 10 days confinement in jail, ordered 9 months of probation and suspended license, fined $250.00, ordered to pay court costs of $20.00, do community service, attend DWI school, and abide by court restrictions.
On December 4, 1997, the applicant was arrested in Fort

Meyers, Florida for one count of possession of cocaine, one count of possession of drug paraphernalia, and one count of cultivation of marijuana. The possession of cocaine and possession of drug paraphernalia charges were dismissed on May 29, 1998.

On August 29, 1999, the applicant was arrested for possession of cocaine and jumping felony bail.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.- Except as otherwise provided in this Act, aliens who are ineligible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
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> * * *
>
> (2) CRIMINAL AND RELATED GROUNDS.-
>
> (A) CONVICTION OF CERTAIN CRIMES.-
>
> (i) IN GENERAL.- Except as provided in clause (ii), an alien convicted of, or who admits having committed, or who admits committing such acts which constitute the essential elements of-
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> * * *
>
> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substance Act (21 U.S.C. 802), is inadmissible.
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> * * *
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> (6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-
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> * * *
>
> (C) MISREPRESENTATION.-
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> (i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

[redacted]

* * *

(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon an alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) OTHER ALIENS.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 of the Act or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) EXCEPTION.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) ALIENS UNLAWFULLY PRESENT.-

(i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-

* * *

[redacted]

> (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure from the United States, is inadmissible.
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> * * *
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> (v) WAIVER.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(h) of the Act states:

> The Attorney General may, in his discretion, waive application of... subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if-
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> (1)(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that-
>
> > (i)...the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,
> >
> > (ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and
> >
> > (iii) the alien has been rehabilitated; or
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United

States citizen or lawfully resident spouse, parent, son, or daughter of such alien; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

* * *

Section 212(i) of the Act states:

ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have who have committed a crime involving moral turpitude or have been

present in the United States without a lawful admission or parole. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See *Fiallo v. Bell*, 430 U.S. 787 (1977); *Reno v. Flores*, 507 U.S. 292 (1993); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). *See also Matter of Yeung*, 21 I&N Dec. 610, 612 (BIA 1997).

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as section 212(a)(9)(A)(i) and (ii). Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under former sections 242 or 217 of the Act, 8 U.S.C. § 1252 or § 1187, or ordered excluded under former section 236 of the Act, 8 U.S.C. § 1226, and who have actually been removed (or departed after such an order) are inadmissible for 10 years.

The Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors that offset the fact of deportation or removal at Government expense and any other adverse factors that may exist. Circumstances which are considered by the Service include, but are not limited to: the basis for removal; the recency of removal; the length of residence in the United States; the moral character of the applicant; the alien's respect for law and order; the evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and to others; and the need for the applicant's services in the United States. *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978). Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. *Matter of Acosta*, 14 I&N Dec. 361 (D.D. 1973).

In *Matter of Tin*, the Regional Commissioner held that unlawful presence is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for

permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. Following *Tin*, an equity gained while in an unlawful status can be given only minimal weight.

The applicant entered the United States in February 1992 and remained longer than authorized. In 1995, she married a United States citizen and the couple had a child together, a son born in the United States in 1996 who currently resides with his father in Florida. The applicant's criminal arrest history dates spans a six-year period from May 1993 through August 1999. In September 1999, an immigration judge ordered the applicant deported from the United States.

It is noted that the applicant also has two adult children from a prior spouse who reside in New Zealand with their father. In 2001, while in New Zealand after her deportation from the United States, the applicant had a fourth child, whose father is a citizen of New Zealand. That child is residing with the applicant and is the beneficiary of a visa petition filed on his behalf by the applicant's U.S. citizen spouse.

The record includes an affidavit and documentation from the applicant's spouse indicating that he has an established business in Florida. He has a long history of cigarette smoking and numerous associated medical problems, including emphysema and asthma, which require medication and monitoring. He currently cares for the couple's child and assists his elderly mother in her daily activities. The spouse has two additional children from prior marriage(s) and two grandchildren

The favorable factors in this matter include the applicant's family ties and responsibilities as the spouse and mother of United States citizens.

The unfavorable factors in this matter include the applicant's remaining in the United States longer than initially authorized, her criminal violations, her unlawful presence, her deportation, and her failure to reveal her criminal history to a consular officer.

The applicant's actions in this matter cannot be condoned. She has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

Service instructions at O.I. 212.7 specify that a Form I-212 application will be adjudicated *first* when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected, and the fee refunded.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States that are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957); *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has failed to establish that she warrants the favorable exercise of the Attorney General's discretion. Accordingly, the decision of the officer in charge to deny the Form I-212 application will be affirmed.

ORDER: The appeal of the denial of the applicant's Form I-212 is dismissed and the decision to deny the Form I-601 is withdrawn.